

CHRISTOPHER M. CORNELL,)
)
 Plaintiff,)
)
 v.) No. 4:10CV1208 HEA
)
 CATHERINE HANAWAY, et al.,)
)
 Defendants.)

This matter is before the Court upon the motion of Christopher M. Cornell (registration no. 33443-044), an inmate at FCI Big Spring, for leave to commence this action without payment of the required filing fee [Doc. #2]. For the reasons stated below, the Court finds that plaintiff does not have sufficient funds to pay the entire filing fee and will assess an initial partial filing fee of \$29.69. See 28 U.S.C. § 1915(b)(1). Furthermore, based upon a review of the complaint, the Court finds that the complaint should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

Pursuant to 28 U.S.C. § 1915(b)(1), a prisoner bringing a civil action in forma pauperis is required to pay the full amount of the filing fee. If the prisoner has insufficient funds in his or her prison account to pay the entire fee, the Court must assess and, when funds exist, collect an initial partial filing fee of 20 percent of the

greater of (1) the average monthly deposits in the prisoner's account, or (2) the average monthly balance in the prisoner's account for the prior six-month period. After payment of the initial partial filing fee, the prisoner is required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency having custody of the prisoner will forward these monthly payments to the Clerk of Court each time the amount in the prisoner's account exceeds \$10, until the filing fee is fully paid. Id.

Plaintiff has submitted an affidavit and a certified copy of his prison account statement for the six-month period immediately preceding the submission of his complaint. A review of plaintiff's account indicates an average monthly deposit of \$148.45, and an average monthly balance of \$30.99. Plaintiff has insufficient funds to pay the entire filing fee. Accordingly, the Court will assess an initial partial filing fee of \$29.69, which is 20 percent of plaintiff's average monthly deposit.

28 U.S.C. § 1915(e)

Pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court must dismiss a complaint filed in forma pauperis if the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief. An action is frivolous if it "lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 328 (1989); Denton v. Hernandez, 112 S. Ct. 1728,

1733 (1992). An action is malicious if it is undertaken for the purpose of harassing the named defendants and not for the purpose of vindicating a cognizable right. Spencer v. Rhodes, 656 F. Supp. 458, 461-63 (E.D.N.C. 1987), aff'd 826 F.2d 1059 (4th Cir. 1987). A complaint fails to state a claim if it does not plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007).

The Complaint

Plaintiff brings this action pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Named as defendants are Catherine Hanaway (former United States Attorney), the United States of America, and Ronald Jenkins (Court-Appointed Defense Attorney). Plaintiff seeks monetary relief.

Plaintiff was indicted for conspiracy to distribute cocaine, attempting to distribute cocaine, and use of a communication facility on September 28, 2006. See United States v. Cornell, 4:06CR594 JCH (E.D. Mo.). The indictment was signed by the grand jury foreperson and the Assistant United States Attorney. Id. (Doc. No. 1). Plaintiff pled guilty to use of communication facility, and the other counts were terminated. Id. Plaintiff was sentenced to a prison term of forty-eight months.

Plaintiff alleges that the indictment in the criminal action was not signed by either the grand jury foreperson or the Assistant United States Attorney. Plaintiff believes

this means that the indictment was null and void, and that his current confinement is therefore unlawful.

Discussion

The complaint is frivolous. First, the Court takes judicial notice of the case file in the criminal action and finds that the indictment was signed by the grand jury foreperson and the Assistant United States Attorney. And even if the indictment had not been signed, the allegations in the complaint do not rise to the level of a constitutional violation. As a result, the complaint must be dismissed under 28 U.S.C. § 1915(e).

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion to proceed in forma pauperis [Doc. #2] is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiff shall pay an initial filing fee of \$29.69 within thirty (30) days of the date of this Order. Plaintiff is instructed to make his remittance payable to "Clerk, United States District Court," and to include upon it: (1) his name; (2) his prison registration number; (3) the case number; and (4) that the remittance is for an original proceeding.

IT IS FURTHER ORDERED that the Clerk shall not issue process or cause process to issue upon the complaint because the complaint is frivolous.

An Order of Dismissal will accompany this Memorandum and Order.

Dated this 6th day of August, 2010.

A handwritten signature in black ink, appearing to read "Henry Edward Autrey", with a long horizontal flourish extending to the right.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE